

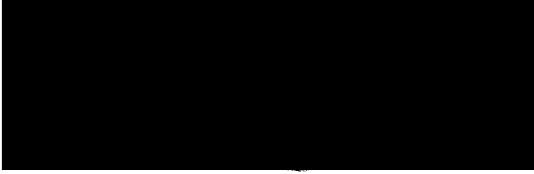


U.S. Department of Justice

Immigration and Naturalization Service

B1

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: WAC-98-068-52043

Office: California Service Center

Date:

JAN 8 2001

IN RE: Petitioner:



Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993.

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. The Associate Commissioner, Examinations, summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the appeal will be reviewed on its merits, and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993.

The director denied the petition finding that the petitioner failed to establish eligibility on several grounds. The director found that the structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a six-year period, did not constitute a qualifying investment. The director also found that the structure of the petitioner's investment did not constitute a qualifying "at risk" investment for the purposes of this proceeding. The director further found that the petitioner failed adequately to document the source of his funds and thereby failed to establish that the funds were obtained through lawful means.

In response to the director's decision, the petitioner filed an appeal on December 16, 1998. The Administrative Appeal Unit (AAU) acting on behalf of the Associate Commissioner for Examinations, summarily dismissed the appeal on February 8, 1999. On motion, counsel asserts that a subsequent brief was submitted in support of the appeal. The record, in fact, now contains that brief. Therefore, the previous decision of the AAU is vacated and the appeal will be reviewed on its merits.

On appeal, counsel for the petitioner contended that the center director's denial was based on the findings in Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998) and that both decisions ignore over five years of well-settled Service interpretation of the immigrant-investor provisions. Counsel argued that the center director illegally applied the precedent retroactively and rendered her decision without notice and without affording the petitioner an opportunity to comment on the rule change.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is

actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner is a native of the People's Republic of China and a citizen of Taiwan. The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition is based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to \$500,000 and indicating that the new business is a "regional center" eligible for participation in the Immigrant Investor Pilot Program. The petitioner contends that he is one investor, in a plan to recruit up to 30 investors, in [REDACTED] Limited Partnership (the "Partnership"). The general partner of [REDACTED] LP is [REDACTED] Export, Limited Liability Company (the "General Partner"). The petitioner also stated that the General Partner is itself designated as a "regional center" that is eligible to satisfy the employment creation provision by demonstrating indirect employment creation through revenues generated from increased exports. The petitioner stated that he is in the process of investing \$500,000 in the Partnership. The petitioner's investment of capital is in the form of a promissory note with the Partnership.

The petitioner submitted a letter dated August 15, 1997, from the Immigration and Naturalization Service's (the "Service") Assistant Commissioner for Benefits designating the General Partner a regional center. Pursuant to the terms of the designation, aliens could file petitions for new commercial enterprises located within the General Partner's development area, which was identified as the former military bases in Sacramento, San Bernardino, and Riverside Counties, California. The letter explained that, to qualify for indirect employment creation, a petitioner would have to show that the new commercial enterprise was located at such a base and that the claimed employment was, or would be, created through revenues generated from increased exports.

MINIMUM INVESTMENT AMOUNT

8 C.F.R. 204.6(e) states, in pertinent part, that:

¹ CMB is an acronym for California Military Bases.

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(f) states, in pertinent part, that:

Required amounts of capital. (1) *General.* Unless otherwise specified, the amount of capital necessary to make of capital necessary to make a qualifying investment in the United States is one million dollars (\$1,000,000).

(2) *Targeted employment area.* The amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is five hundred thousand dollars (\$500,000).

8 C.F.R. 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

In a memorandum accompanying the Form I-526, the petitioner's representative claimed that the Partnership will invest in economic development projects serving three California counties impacted by the closure of United States military bases in those counties. The projects focus on converting the former military airport facilities to commercial use. Counsel asserted that the impacted counties qualify as targeted employment areas. It was stated that:

the employment creation will occur in Riverside, Sacramento and San Bernardino counties in California, within a "targeted employment area" according to § 203(b)(5)(B)(ii) of the Immigration and Nationality Act.

To support the claim that the three counties qualify as targeted employment areas, counsel submitted excerpts of a publication by the California Trade and Commerce Agency titled "Investor Visa Program." The submission included a map of California titled "Qualifying Counties" and a table of cities and counties with corresponding unemployment rates compiled from 1995 annual average unemployment rates.

The petitioner has failed to demonstrate that the three counties where the Partnership will be doing business qualify as targeted employment areas under the definition of high unemployment areas pursuant to 8 C.F.R. 204.6(j)(6)(ii). First, the petitioner did not furnish a letter from an authorized official of the state or county governments certifying that the counties were designated high unemployment areas pursuant to 8 C.F.R. 204.6(j)(6)(ii)(B). 8 C.F.R. 204.6(i) requires that such a letter from an authorized state official include a description of the geographic boundaries of the designated area and a description of the method by which the statistics were obtained. The petitioner did not satisfy this documentary requirement.

Second, the petitioner did not submit adequate evidence establishing that the counties qualify as high unemployment areas pursuant to 8 C.F.R. 204.6(j)(6)(ii)(A). The map and the tables submitted by the petitioner do not support the claim that the counties qualify as targeted employment areas. The map, in fact, reflects that San Bernardino and Sacramento counties had unemployment rates below the target of 8.4 percent and thereby were not qualifying counties with 150 percent of the national unemployment rate in 1995. A separate attachment was submitted listing the three counties and stating their "qualifying rate" as 9.6 percent, 11.3 percent, and 9.6 to 12.4 percent, respectively, and stating the national unemployment rate as 5 percent. However, the petitioner did not provide a citation of the source of this data or indicate the year from which the data was compiled. Therefore, this document is not dispositive. The accompanying table consists of a partial breakdown of the county unemployment data by selected cities; however, the petitioner did not submit

information identifying the geographic location of the affected airport facilities where the capital investments will occur. Therefore, the Service is unable to determine what the unemployment rates were in the geographic or political subdivisions contemplated by the petitioner as targets for investment.

Finally, the evidence submitted is based on 1995 unemployment data. The Partnership was established in December 1997 and the petition was filed in March 1998. In order for an investment to qualify for the reduced capital investment in a targeted employment area, the petitioner bears the burden to submit evidence establishing that the areas were designated as high unemployment areas as of the time of filing. Matter of Soffici, I.D. 3359 (Assoc. Comm., Ex., June 30, 1998). The submission of data from 1995 does not meet this burden.

In addition, the petitioner's documentation indicates that the State of California has conducted programs to address the economic impact of the base closures since 1988. It is reasonable to assume that the State's efforts have had some degree of success and had reduced the unemployment rates of those areas as of the date the petition was filed. For this additional reason, it is incumbent on the petitioner to provide unemployment statistics from the year most closely associated with the date the petition was filed.

Based on the documentation furnished by the petitioner, it cannot be concluded that the three counties, or the relevant political subdivisions of those counties, qualify as targeted employment areas with unemployment rates of at least 150 percent of the national average. Therefore, the amount of capital necessary to make a qualifying investment in this matter is \$1,000,000.

ESTABLISHMENT OF NEW COMMERCIAL ENTERPRISE

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-

expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. 204.6(j)(4)(ii).

According to the plain language of § 203(b)(5)(A)(i) of the Act, a petitioner must show that he or she is seeking to enter the United States for the purpose of investing in a new commercial enterprise that "the alien has established." A petitioner must establish eligibility as of the date the petition was filed. Matter of Katigbak, 14 I&N Dec. 45 (Comm. 1971).

In this matter, the new commercial enterprise on which the petition is based is [REDACTED] LP. The record shows that the organizing documents for the General Partner were filed with the California Secretary of State on January 19, 1997. The Partnership Agreement references December 1, 1997 as the establishment date.

The record contains a California Certificate of Limited Partnership for CMB, LP dated December 1, 1997. The Certificate, however, does not contain an endorsement showing that it was formally filed with the California Secretary of State. Article 2 of the California Revised Limited Partnership Act, §15621, provides that in order to create a limited partnership, the partners must file the certificate with the Secretary of State and the partnership is considered formed as of the date of filing. Subsection (c) provides that a copy of the certificate duly certified by the Secretary of State is prima facie evidence of the partnership's existence. As stated above, the certificate submitted in support of the petition is not duly certified by the Secretary of State. Absent proof of formal registration with the Secretary of State, the petitioner has not demonstrated that [REDACTED] LP has, in fact, been "established."

In describing the Partnership as the new commercial enterprise, the petitioner submitted a list of eight limited partners, including herself. It was also stated in the document that the General Partner holds 55 percent ownership of the Partnership and that the limited partners, as a group, hold the remaining 45 percent. In an accompanying letter, counsel stated that the General Partner planned to recruit a total of 30 alien investors as limited partners in [REDACTED] LP.

The petitioner submitted an English-language document titled "Investment Agreement and Power of Attorney" wherein he agreed to become a member of the Partnership and agreed to the capital

contribution provisions. The document is dated October 9, 1997, and bears the signature of the petitioner, executed in Taipei, Taiwan. Section 1(C) of the investment agreement provides:

The Partnership has agreed to accept and admit me as a Limited Partner upon (a) my execution of the relevant documents, (b) the approval of my petition for classification as an alien entrepreneur, (c) the approval of my visa application either by the U.S. Department of State (in the case of consular processing abroad) or the Immigration and Naturalization Service (in the case of adjustment of status within the United States), and (d) the receipt of my initial cash payment capital as provided herein.

The evidence submitted does not demonstrate that the petitioner established [REDACTED] LP within the meaning of 8 C.F.R. 204.6(h)(1). First, the petitioner has not adequately shown the date on which the Partnership was formally established in the State of California, or, for that matter, that it has been established. Second, the act of signing the investment agreement, in and of itself, did not admit the petitioner as a limited partner. Pursuant to the investment agreement, the petitioner's admission to the Partnership is contingent on the occurrence of four events: execution of the relevant documents, making the initial cash payment of \$120,000, approval of the visa petition, and admission as or adjustment to United States permanent resident status. As the petition has not been approved and the alien has not been admitted as a lawful permanent resident, the alien is not yet a limited partner of [REDACTED] LP. A petitioner cannot be said to have established a business where there is no actual ownership interest in that business. Therefore, it cannot be concluded that the petitioner established a new commercial enterprise within the meaning of the Act. For this reason, the petition may not be approved.

Moreover, in a business venture of this type, the Limited Partnership is conceived of and developed by the General Partner. The General Partner then recruits investors to serve as limited partners. In this case, the General Partner has stated its intent to recruit 30 alien investors thereby assembling capitalization of \$15 million. In order for all 30 alien limited partners to satisfy the "establishment" provision of § 203(b)(5) of the Act, wherein the limited partnership is presented as an original business pursuant to 8 C.F.R. 204.6(h)(1), the General Partner must complete its recruitment of those investors prior to "establishing" the Partnership. See also Matter of Izumii, supra.

There are additional provisions whereby investors may satisfy the establishment requirement by investing in an existing business. 8 C.F.R. 204.6(h)(2) provides that an alien investor may demonstrate that he or she has purchased an existing business, and restructured

or reorganized that business, such that a new enterprise results. 8 C.F.R. 204.6(h)(3) provides that an alien investor may demonstrate that he or she has invested in and expanded an existing business with the result of a 40 percent increase in the net worth or the number of employees of that business. It would be difficult, if not impossible, for a petitioner in a limited partnership, where partners join sequentially, to satisfy either of these requirements.

Due to the inherent nature of a limited partnership, no individual partner or partners purchase the business in its entirety and therefore could not satisfy the establishment requirement under 8 C.F.R. 204.6(h)(2). Additionally, merely adding investment capital to an existing business would not result in any restructuring or reorganizing of the business. If the business were restructured or reorganized so that a new business resulted, it would negate the business plan of any existing investors.

Similarly, it is improbable in a limited partnership of three or more investors, each of whom invest the same amount of capital, to satisfy the establishment requirement by expanding an existing business by at least 40 percent as required under 8 C.F.R. 204.6(h)(3). An existing business is made "new" by virtue of a substantial increase in its net worth or in its number of employees. In order for a pre-existing business to be made new, the pre-existing business must have been fully functioning and doing business. The petitioner must also demonstrate that the "new business," that is the business as expanded, was established as of the filing date of the petition. Each investor, therefore, must demonstrate that the requisite 40 percent expansion of the business had already occurred as of the filing date of the petition and that the expansion was the result of his or her individual investment. In this case, each and every one of the 30 investors who had not participated in the original establishment of [REDACTED] LP would have to demonstrate that the business was expanded by at least 40 percent as of the filing date of their individual petitions.

Finally, the petitioner will not be engaging in the enterprise. 8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the ULPA, he is sufficiently engaged in the management of the partnership. Section 7.01 of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the California Limited Partnership Act. However, under Section 17.01 of the Partnership Agreement, all limited partners irrevocably appoint the General Partner as his or her true and lawful attorney and agent. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Section 7.01, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA. As such, the petitioner is a purely passive investor.

INVESTMENT

8 C.F.R. 204.6(e) states, in pertinent part, that

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. ...

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of

investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The director found that the terms of the petitioner's promissory note and investment plan were defective. Both are similar to the promissory notes and investment plan rejected in Matter of Izumii. Specifically, the promissory note includes a balloon payment due at the end of five years and the investment provisions provide for partnership expenses, reserve funds, guaranteed payments, and a redemption agreement.

Promissory Note

As evidence of his investment, the petitioner submitted a promissory note. The terms of the note provide for an initial deposit of \$120,000 into a trust account, to be released to the partnership upon approval of the immigrant visa, five annual payments of \$18,000, and a final "balloon" payment of \$290,000.

Relying on Matter of Izumii, supra, the director held that the petitioner must substantially complete payments on the promissory note prior to the expiration of the two-year conditional period of permanent residence in order for the promissory note to be considered a qualifying contribution of capital. See 8 C.F.R. 216.6(a)(4)(iii). The director rejected the six-year payment schedule offered by the petitioner finding that the petitioner would not have substantially completed making the necessary investment at the expiration of the two-year period of conditional residence and, in fact, would have "invested" only \$156,000 as of that date.

On appeal, counsel asserts that the precedent decision requiring substantial completion of the investment within the two-year conditional period constitutes a new rule not found in the statute or the regulations. Counsel also argues that the analysis set forth in Matter of Izumii should not be applied retroactively to cases filed prior to its issuance. Counsel finally argues that requiring completion of payments on a promissory note within two years defeats the purpose of such an instrument and asserts that the six-year payment schedule of the petitioner should be accepted as a qualifying contribution of capital.

Counsel essentially argues that the precedent decision on which the director relied was violative of the Administrative Procedures Act (APA), 5 U.S.C. § 553, and constituted improper rule making. The argument is not persuasive. Contrary to counsel's assertion, published precedent decisions represent the Service's interpretation of the statute and the regulations and are used to provide guidance in the administration of the Act. They do not represent rule making requiring notice and comment pursuant to the provisions of the APA. The Associate Commissioner publishes precedents under authority delegated by the Commissioner of the Service and the Attorney General, 8 C.F.R. 2.1, and precedent decisions are binding on all Service officers. 8 C.F.R. 103.3(c). The center director, therefore, was bound to apply the relevant precedents in adjudicating the instant petition. Neither was it improper to apply the precedent to a petition that was filed prior to the issuance of the precedent. The precedent interpreted the existing regulations which were in effect prior to the filing of the instant petition.

Furthermore, in R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court concluded that the AAO precedent decisions did not involve rule making and did not add any new requirements. The District Court for the Western District of Washington stated in an unreported decision:

Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that

applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.) Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000).

That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations.

Therefore, the center director acted properly in applying the findings in Matter of Izumii to any pertinent case before her. Accordingly, the director's finding that the petitioner must substantially complete all of the payments of a promissory note within the two-year conditional period in this matter is affirmed. Counsel's additional argument that the Izumii interpretation defeats the purpose of utilizing a promissory note in seeking this benefit is without merit. The precedent held that where a promissory note is submitted as evidence that the alien is "in the process of investing" the required capital, the payments on the promissory note must be substantially completed within the two-year conditional period, in the same manner as the payments on a cash investment must be substantially completed within the two-year period, in accordance with 8 C.F.R. 216.6(c)(1)(iii).

Contrary to counsel's argument, the use of long-term promissory notes, extending beyond the two-year conditional period, arguably defeats the express purpose of the immigrant investor program, that is, attracting an infusion of capital to the United States economy and creating jobs within a defined period of time. Accordingly, the terms of the petitioner's promissory note disqualify the note from being considered an investment or evidence of being in the process of investing.

Money Set Aside For Partnership Expenses

The petitioner furnished a letter from the Wells Fargo Bank, Los Angeles, California dated November 20, 1997, verifying that \$120,000 had been received and deposited into a custody account with [REDACTED] or [REDACTED] on behalf of their law firm, as Trustee. According to section 2.A(3) of the investment

agreement, the petitioner agreed to instruct counsel, as trustee of the escrow account, "immediately to release to the Partnership US\$30,000 as a refundable advance for initial operating needs of the Partnership; and that if, as and when my visa application is approved by the Department of State (in the case of consular processing abroad), an additional US\$90,000 from the bank escrow account will be transferred to the Partnership and simultaneously I will be admitted into the Partnership as a Limited Partner."

The payment of initial Partnership expenses and costs is not the type of profit-generating activity contemplated by the regulations; it does not evidence the placement of capital at risk for the purpose of generating a return on the capital. See 8 C.F.R. 204.6(j)(2). As stated in Matter of Izumii, *supra*, if the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based. The \$30,000 paid to the Partnership for unspecified expenses is not money available for investment in job creating activities. Therefore, the petitioner's investment plan would not constitute an investment of at least \$500,000 into an employment creating enterprise, but something less.

On appeal, counsel contends that Matter of Izumii and the center director's decision were in error. Counsel argues, in pertinent part, that:

The INS has failed to recognize that investing capital for the purpose of generating a return on the capital is not necessarily the same as job creation. Capital can be used for purposes of generating a return, be at commercial risk, and have nothing to do with job creation. The law does not require 100% of the capital to be used for job creation; it just requires 100% of the capital to be at risk and the jobs be created.

The AAO/INS rule that the full amount must be made available to the enterprise "most closely responsible" for creating the employment would require investors to directly invest in the export business themselves. Such a rule ignores INS' own designation of regional centers and ignores permissible indirect job creation through increased export sales and improved regional productivity as evidenced by reasonable methodologies.

The argument is not persuasive. First, as was discussed above, investment terms similar to those at issue in this case were rejected in Matter of Izumii, *supra*, and the Service is bound by that decision. Second, counsel's discussion of risk and job creation is a mischaracterization of Izumii and the director's

finding. Neither Izumii nor the director require that the funds only be used for salaries and other hiring expenses. Rather, the funds must be made available to the entity which will be creating the employment.

According to the Investment Agreement, the release of \$30,000 was for unenumerated "initial expenses of the Partnership." 8 C.F.R. 204.6(j)(2) requires that the petitioner place "the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." (Emphasis added.) In Matter of Izumii the Associate Commissioner explained that the Service is not prohibiting the payment of expenses of the partnership or even of the immigration-related fees, but that any funds dedicated to such expenses could not be included as part of the minimum capital contribution which must be dedicated to generating a return. It was further explained that particularly in cases under the Pilot Program where the nexus between the investment and the job creation were already tenuous, the Service does not wish to allow for layers of holding companies, each deducting operating expenses from the initial investment, so that the entity that is ultimately responsible for job creation would have the benefit of significantly less than the "required amount" of capital.

The statute requires that a petitioner satisfy the minimum requirement for both the level of capital investment and the level of employment creation in order to qualify for immigrant investor status. Obviously there is no upper limit for either requirement. The specific levels of actual investment and actual job creation are left up to the market and to the nature of the new commercial enterprise that was created. The fact that an investor might create the minimum number of jobs with less than the minimum amount of capital investment is irrelevant. Clearly, both requirements must be satisfied. Therefore, the Service holds that the petitioner must demonstrate that at least the minimum required amount of capital be made available to the entity most closely responsible for job creation, regardless of any initial expenses such as legal fees or immigration-related fees.

Later in the brief, counsel asserts that [REDACTED] LP is the Partnership, the new commercial enterprise, and the job-creating enterprise because it is a regional center permitted to rely on indirect job creation. Therefore, argues counsel, money made available to [REDACTED] LP is made available to the job-creating enterprise. The concept of a regional center is that exports lead to indirect job creation. [REDACTED] LP will not be engaged in the export business, but the financial business. In order to demonstrate that an investment leads to indirect job-creation,

therefore, it must be shown that the entire investment amount is made available to an export business.²

Reserve Funds

The director concluded that the provisions in the Partnership Agreement authorizing the maintenance of reserve funds were unacceptable according to Izumii. On appeal, counsel again disputes the director's reliance on the Izumii standard in finding that funds held in reserve are not available to the employment creating entity and do not constitute a qualifying contribution of capital. For the reasons discussed above pertaining to the precedent decision, counsel's argument does not overcome the director's finding. Section 4.04(B) of the Partnership Agreement, however, specifies only that the reserve funds may be used for investment objectives. It is not clear, therefore, that the Partnership is using these reserve funds to set aside money for fees or to fund future buy back options. As all the money invested is supposed to be used for investment objectives, however, the purpose of the reserve funds separate from the rest of the Partnership's funds is not clear.

Guaranteed Returns

According to section 2.B of the Investment Agreement executed by the petitioner, the petitioner must make five annual cash payments of \$18,000 each, totalling \$90,000, commencing one year from the date he is admitted to the Partnership. Section 3 of the Investment Agreement, however, states:

I shall receive a return on the cash I have contributed to the Partnership in the amount of 12% per annum, payable annually, commencing one year from the date I am admitted to the Partnership as a Limited Partner and ending five years thereafter.

The petitioner would also receive a share of any profits exceeding this 12 percent return. The partnership agreement explains that the percentage return is computed on the basis of the total cash contributed at the time the distribution is made. As stated in Matter of Izumii, supra, an alien may not receive guaranteed payments from a new commercial enterprise while he or she owes money to the new commercial enterprise. In this case, the petitioner would receive at least \$93,600 in annual distributions during the five years in which he is obligated to make annual payments of \$18,000, an amount in excess of his total \$90,000

² While the record contains some minimal evidence of negotiations and potential projects, the record contains no evidence of any money being transferred to export-related projects.

contribution. Under these terms the commercial enterprise would not receive an infusion of new funds from the petitioner; in fact the Partnership would pay out more in returns than the petitioner's contribution. Therefore, the schedule of the five annual payments intended to represent \$90,000 cannot be considered a qualifying contribution of capital toward the \$500,000 target.

Counsel argues that the director's conclusion that the guaranteed returns would be paid out of the funds already "invested" is impermissible speculation and that the Service should make this type of determination at the removal of conditions stage. Counsel further argues that:

...the wording of the new AAO rule does not appear to require, or even allow, the INS to "cry foul" at this early stage. The rule states that the "alien cannot receive guaranteed payments while he still owes money to the enterprise." This petitioner, however, has not yet received any guaranteed payments. The petitioner does not even become a limited partner until approval of the immigrant visa or adjustment of status....

Therefore, the INS objection is premature at this point.

It is not pure speculation to conclude that an agreement which guarantees a return of \$93,600 while requiring only \$90,000 in payments will not result in the infusion of additional capital beyond the initial \$120,000 invested. The Service does not need to wait two years to determine whether or not this agreement will result in the infusion of new capital. According to its very terms, it will not. Arguing that the Partnership may not perform on its obligations is not persuasive. It is not clear how counsel wishes the director to evaluate the investment if not by examining its terms to which both the Partnership and petitioner agreed.

Furthermore, the fact that the petitioner has not yet received his first annual guaranteed interest payment is irrelevant. Those terms are part of the agreement(s) submitted to satisfy the capital investment requirements. Eligibility must be established at the time of filing. Based on the guaranteed return terms of the investment agreement, the petitioner has not established that he is making a qualifying investment.

Redemption Agreement

Section 4 of the Investment Agreement provides:

After the sixth anniversary of my admission to the Partnership, I, as a limited partner, may exercise a sell option under which I have the right to require the

Partnership to purchase from me my limited partnership interest.

The sell-option price is fixed by the Investment Agreement to equal the petitioner's total contributed capital, less the first six payments, plus a pro rata share of profits. Under these terms, the sell-option price, which is the final payment of \$290,000 plus a share of any profits, would equal or exceed the \$290,000 final "balloon payment" of the investment plan.

The Partnership Agreement, section 8.05, however, provides different terms for redemption. The agreement provides that a limited partner may exercise his or her sell-option "only after 60 months have expired" and the sell-option price is "the full amount of capital contributed to the Partnership by the selling partner less the four annual cash payments." Under these terms, the sell-option price would be \$120,000 and could be exercised prior to the final balloon payment of \$290,000 coming due.

The record does not establish which agreement is controlling. Under the Investment Agreement, the petitioner can obtain the return of his final balloon payment by exercising his sell option, thus, the amount of \$290,000 cannot be considered to have been placed at risk. The petitioner's agreement to make this payment of \$290,000 is, in essence, a debt arrangement in which he provides funds in exchange for an unconditional, contractual promise that it will be repaid later at a fixed maturity date (within six months). Such an arrangement is specifically prohibited by the regulations. See 8 C.F.R. 204.6(e). Under the Partnership Agreement, the petitioner can exercise the sell-option at the end of five years and thereby entirely avoid making the final payment. The amount of \$290,000 would not only not be placed at risk, it would never be invested.

As stated in Matter of Izumii, supra, an alien cannot enter into a partnership knowing that he or she already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of the cash payments under a promissory note, an alien investor may not enter into any agreement granting him the right to sell his interest back to the partnership. Id.

The partnership agreement at section 8.06, also provides a buy-option whereby the General Partner, through the Partnership, may acquire each limited partner's interest "in its entirety" at any time "after 60 months following the Limited Partner's admission" for an amount equal to the sell-option price. For an investment to be considered "at risk," the investment must risk both profit and loss. See Matter of Izumii, supra. In this case, the General Partner has an absolute right to buy the limited partner's interest

at a fixed price regardless of the profitability or the worth of that interest. Under such terms, in the event the enterprise is highly successful and profitable, the General Partner could purchase the limited partner's interest at a fixed price and assume total ownership of the enterprise.

On appeal, counsel disputed the director's rejection of the redemption agreement on the grounds that it was a new rule. This argument was addressed above. Counsel also argued that such "exit provisions" are common in business and that risk exists for the petitioner because the General Partner may not have sufficient funds to fulfill its obligation to buy out a limited partner on demand and because the petitioner is not required to exercise his sell-option and may not do so.

The arguments are not persuasive. Counsel submitted no evidence to substantiate the claim that the specific terms of the buy and sell options of the Partnership and Investment agreements are options that are common in venture capital investments. To constitute business "risk" an investment must risk both profit and loss. See Matter of Izumii, supra. Under the sell-option, the petitioner does not risk loss. Under the buy-option, the petitioner has forfeited the absolute "risk" of enjoying the potential profits of his investment. Such provisions have not been shown to be consistent with standard business practices and have been found to be inconsistent with a qualifying at-risk investment as contemplated by the statute.

The additional argument that the General Partner might default on its contractual obligation to purchase the limited partner's interest is not persuasive in that it does not constitute the type of risk "in a profit-generating enterprise" within the meaning of 8 C.F.R. 204.6(j)(2). Risk of default within the investment group is not the same as risk of failure in the commercial enterprise. Furthermore, whether or not the petitioner exercises his sell-option, that option does exist and thereby negates the normal risk of his business investment.

Counsel also argues that there is no legal authority that a redemption agreement constitutes a debt arrangement. When the redemption agreement, however, provides that one party has the right to redeem his interest for the full amount that he paid for the interest, the results are the same as if it had been a loan. The name of the agreement is not determinative. Rather, the terms of the agreement must be examined. A guaranteed return of a predetermined amount of money is a guaranteed return of a predetermined amount of money whether it is called a "loan" or a "redemption agreement."

Fair Market Value of Promissory Note

Pursuant to 8 C.F.R. 204.6(e) all capital must be valued at fair market value. By definition, fair market value rests in the present value of the commodity. As stated in Matter of Izumii, supra, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that he has placed his assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Ex., July 31, 1998). Otherwise, the note is meaningless.

Counsel indicated in the memorandum accompanying the Form I-526 that the petitioner was actively in the process of investing capital and that the petitioner's promissory note is secured by the petitioner's personal assets. To establish that a promissory note is secured by the petitioner's personal collateral, it is not sufficient merely to identify personal assets. As stated in Matter of Hsiung, supra, "[m]erely 'identifying' assets as securing a loan, without perfecting the security interest, is not meaningful since the note holder cannot be assured that the identified assets will remain available for seizure in the event of a default." The funds allegedly securing the note were not placed into any type of escrow account or other guaranteed financial instrument securing the promissory note. Nor is there any evidence that the real property has in any manner been attached as security for the note.

In addition, submitting one-time bank balances of foreign held accounts does not satisfy the petitioner's burden of proof. Personal bank accounts are readily dissipated. Funds available at the outset of the petitioner's investment may not be available throughout the life of the promissory note. The petitioner also failed to establish, under Taiwanese law, the extent to which those assets are amenable to seizure by a U.S. note holder in the event of a default. Further, as one of the pieces of property is owned entirely by his wife according to the appraisal report, the petitioner has not documented that Taiwanese law would allow for this property to be seized to satisfy the petitioner's personal obligation.

For these reasons, the petitioner has failed to demonstrate that his promissory note is adequately secured or that it has an adequate fair market value. He has not demonstrated that the security interests in the assets have been perfected, that the

assets would be amenable to seizure by a U.S. note holder, and that the assets have an adequate fair market value. For these reasons as well, the petition may not be approved.

CAPITAL AT RISK

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362, 5 (Assoc. Comm., Examinations, July 31, 1998).

Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), states:

Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough. Id. at 5-6.

Review of the record reveals that the petition was not initially supported with any documentation of business activity other than a business plan discussing potential investments in and around former California military bases. Counsel asserts on appeal that the Partnership will be unable to begin any projects until the Service approves the petitions of the investors and the money is invested. This argument is not persuasive as the terms of the investment agreement provide that the petitioner will infuse only \$120,000 over the next five years, the remainder of the investment will be cancelled out by guaranteed returns. At the end of five years, the petitioner can opt out without ever contributing the remaining \$290,000. Therefore, the Partnership will not have the funds to take any action contemplated in the business plan within the next five years, and possibly not even after that.

Moreover, the Service cannot be expected to approve investment schemes where all business activity is merely proposed and will take place at some future date. At present, the Partnership is totally uncommitted to any business activity and can pull out without any loss of funds. Therefore, no money is at risk.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Matter of Izumii, supra, at 26. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In support of the petition, the petitioner submitted an affidavit from the petitioner's wife attesting to his employment, business activities, and real estate; a list of all of the petitioner's assets totaling \$2,959,380.72; certifications of account balance confirming balances of \$121,428, \$112,904.75, and \$121,613.92 in three separate Taiwanese accounts on three separate days; and appraisals for property in Taiwan owned by the petitioner and his wife totaling \$1,269,173.36.

The director concluded that the petitioner had not submitted evidence to demonstrate how his assets were accumulated over time, such as tax records, and had not shown the path of the funds resulting in the two bank accounts and the property.

On appeal, counsel argues that tax returns are only a possible form of evidence to show lawful source of funds and are not required, that the petitioner has provided evidence that he obtained his funds in a lawful manner through his employment income, savings, and investments, and that the consulate is in a better position to determine lawful source of funds.

Counsel's argument is not persuasive. While counsel asserts that the petitioner did document his employment, there is simply no such evidence in the record other than the unsupported affidavit of the petitioner's wife. The petitioner did not submit business registration records or certified copies of his tax records from Taiwan as required by 8 C.F.R. 204.6(j)(3). While counsel correctly argued that the submission of tax returns for the preceding five years is not a specific documentary requirement, the submission of some form of evidence that would accomplish the same end is required. 8 C.F.R. 204.6(j)(3)(iii) explicitly requires evidence of the source of the capital, not merely the existence of the capital. The petitioner did not provide any verification of his employment, the size and nature of his business, or of his income from that employment.

Despite counsel's concerns regarding the unavailability or unreliability of tax records, the submission of copies of past tax returns, or something equivalent, does not appear to be too onerous a burden in this proceeding. For these reasons, it cannot be concluded that the center director was too rigid in her rejection of the petitioner's evidence. The petitioner has not adequately established the source of his claimed investment funds or established that the funds were obtained by lawful means. Therefore, the petitioner failed to satisfy his burden of demonstrating the source of his investment funds. For this reason as well, the petition may not be approved.

OTHER SOURCE OF FUNDS

8 C.F.R. 204.6(g)(1) states, in pertinent part:

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all**

capital invested is identified and all invested capital has been derived by lawful means. (Emphasis added.)

Based on the petitioner's assertions, [REDACTED] LP's total capitalization will come from the petitioner, seven identified alien investors, as many as 30 unidentified alien investors, and the General Partner. The petitioner bears the burden to identify the source of all of these funds and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition. There is no evidence identifying the source of the investment capital of the 7 other alien investors or of the General Partner. The petitioner therefore failed to meet the requirements of 8 C.F.R. 204.6(g)(1) and the petition may not be approved on this basis as well.³

EMPLOYMENT CREATION

8 C.F.R. 204.6(m)(7) states:

An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States.

(ii) *Indirect job creation.* To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate

³ This interpretation is consistent with the above discussion finding that all partners in a limited partnership must be identified prior to "establishing" the new commercial enterprise. A partner cannot document the source of investment capital from another as yet unidentified partner. To satisfy the source of funds provision, all partners must be identified and submit documentation of the source of their capital.

the likelihood that the business will result in increased employment.

8 C.F.R. 204.6(j)(4)(iii) states, in pertinent part:

To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports.

In the memorandum accompanying the petition, the General Partner was described as a "lending company" that will loan or invest capital into projects operated by the various regional development authorities converting the former military air bases to commercial use.

In section 2(D) of the memorandum accompanying the petition, counsel asserted that the business plan demonstrates that the petitioner's investment will result in the requisite indirect employment creation. On review, it is concluded that the business plan is insufficient to establish that the requisite level of indirect employment creation will occur. The General Partner's business plan provides a brief review of the history of the military base closures and describes California's strategy to convert those facilities to commercial use. The plan states that the strategy being employed is to convert the former military airport facilities to air cargo service and to convert the surrounding areas to manufacturing and transportation that will take advantage of the air cargo service. The Comprehensive Business Plan for [REDACTED] Export LLC states that, [REDACTED] has moved forward with a business plan to establish a medium by which investment capital is available to empowered economic agencies and businesses within the geographic scope of the designated regional center." The plan further states that the State of California established a "vast network of 50 regional and over 300 city and county economic development organizations dedicated to facilitating business expansion." Finally, the plan states that:

By investing in specific companies that export goods or services, [REDACTED] will create jobs by making capital available for those companies to begin or increase sales. By financing economic agencies whose sole purpose is to actively market each former military base as a cargo airport and incubator for manufacturing [REDACTED] will cause export sales to rise.

As no employment has yet been created, the petitioner must establish that the investment will create jobs indirectly through

revenues generated from increased exports resulting from the new commercial enterprise. 8 C.F.R. 204.6(j)(4)(iii) requires the petitioner to submit evidence that the employment will be created. The petitioner has relied on the business plan to satisfy this requirement.

The business plan of the General Partner does not adequately demonstrate that the requisite number of jobs will be created indirectly from increased exports as a result of the activity of the Partnership. The business plan merely expresses an intent to loan funds to one or more of the 350 economic development agencies said to be addressing the military base closures in California. The economic development agencies would then provide unspecified financial assistance to private companies seeking to locate in one of the affected areas. Those private companies would then engage in business activity, some portion of which may involve exports, and employment would be indirectly created through the increased economic activity.

The petitioner, however, has failed to identify any economic development agency that is specifically dedicated to export programs and has failed to identify any such agency that is seeking financial assistance from a private lending source. The petitioner advanced the claim that CMB has a plan to establish a "medium" by which it would commence doing business. The petitioner did not submit this "plan" or identify the "medium" that is to be established.

Furthermore, in section III(A) of the business plan it was stated that:

Each base reuse plan shows the existing airport facilities to be designed as air cargo facilities. By nature air cargo is export.

The petitioner's contention that air cargo is export-related by its nature is an unsubstantiated generalization. Certainly the vast majority of air cargo in the United States, and in California, is domestic in nature. The petitioner presented no evidence demonstrating that any of the state agencies, any of the airport facilities, or any of the industries planned around the airport facilities will be focused exclusively on exporting goods from the United States. In order to satisfy his burden of proof, the petitioner must do more than merely express intent to invest in a governmental agency seeking to promote a certain type of business activity. See 8 C.F.R. 204.6(j)(2). The petitioner did not satisfy his burden of proof.

In Matter of Ho, I.D. 3362 (Assoc. Comm., Ex., July 31, 1998), the Associate Commissioner set forth minimum standards for a qualifying business plan on which to base an immigrant investor visa petition.

A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible. (Emphasis added.)

The General Partner's "Comprehensive Business Plan" does not meet this standard. The plan does not identify any specific projects in which it seeks to invest. Nor does it present a detailed description of the alleged strategy whereby it will provide "loans" to the regional development authorities. Based on the stated claim that the General Partner plans to oversee an investment of 40 million dollars into long-term profit-generating activities throughout the State of California that would result in the creation of at least 400 permanent full-time jobs, the absence of a truly "comprehensive" business plan, conforming to standard business practices, is inexplicable. Accordingly, the petitioner has failed to establish that the investment would result in the requisite employment creation.

In addition, to establish indirect employment creation, a petitioner may rely on "reasonable methodologies." Section IV of the business plan discusses export sales and methodologies for forecasting indirect job creation. The section discusses some of the proposed redevelopment plans for the former air bases. It also contains the conclusion that one job would be created for approximately each \$60,000 of investment capital. Even accepting the general statistical formula espoused in the referenced document, the petitioner's proposed investment of \$500,000 would result in only 8.3 jobs; not the minimum of 10 jobs required. The petitioner is only obligated to infuse \$120,000 in the first five years. As such, the multiplier does not indicate that the

petitioner will be creating at least 10 jobs within a reasonable amount of time.

Additionally, the statistical formula reflected in the business plan does not rise to the level of a "reasonable methodology" contemplated by the regulation. The petitioner failed to disclose the source of the formula and failed to show that it was a generally accepted principle in the regional economic forecasting of the concerned California development agencies. It is not necessary for the petitioner to commission an independent economic review and employment forecast. It is necessary for the petitioner to provide a comprehensive description of the Partnership's intended investments and provide copies of pertinent economic analyses conducted by appropriate government authorities that include a forecast of job creation resulting from various anticipated investment levels.

The petitioner has failed to provide documentation that would meet this standard; documentation that is readily available in any comprehensive economic development planning program. Absent identifying the specific agencies to which the Partnership would loan money, establishing that those agencies would focus on export related development, and showing that exports would then increase and stimulate the requisite employment creation, the petitioner has not satisfied his burden of proof. Accordingly, the petitioner has not established that the intended investment plan of the General Partner would result in the requisite indirect employment creation. For this reason as well, the petition may not be approved.

In the absence of indirect employment creation, the petitioner must demonstrate direct employment creation. In this regard, it must be noted that the business plan is that of the General Partner, CMB Export, LLC. There is no indication that the Partnership, CMB, LP, has hired or will hire any direct employees. Therefore, the petitioner has failed to demonstrate that his investment would create any direct employment.

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to meet the capital investment minimum of \$1,000,000, has failed to demonstrate that he has created a new commercial enterprise, has failed to show that he has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of his investment capital and that it was obtained through lawful means, and has failed to demonstrate that the investment will result in the requisite employment creation. For these reasons, the petitioner has failed to overcome the decision of the director and the appeal must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden. Accordingly, the petition will be denied.

ORDER: The Associate Commissioner's decision of February 8, 1999 is vacated. The petition is denied.